SUPREME COURT, U. S.

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Case No. 747

In The
Supreme Court of the United States
OCTOBER TERM, 1968

STRUCTURAL LAMINATES, INC., a corporation,
Petitioner,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS — SEATTLE, WASHINGTON

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUMMARY OF ARGUMENT

(1) THERE IS NO GROUND WHICH WOULD SUPPORT OR JUSTIFY A REVIEW OF THIS CASE BY THE COURT.

(2) PETITIONER'S ALLEGED QUESTION IS NOT HERE.

ARGUMENT

(1) THERE IS NO GROUND WHICH WOULD SUPPORT OR JUSTIFY A REVIEW OF THIS CASE BY THE COURT.

As stated in Supreme Court Rule 19, the court has discretion to review cases by certiorari. Review is not a matter of right.

The criteria are set forth in Rule 19. None are applicable here.

This becomes plain on a consideration of the salient features of the case.

In paragraph 1 of the final pretrial order, petitioner's claim was grounded solely on an alleged conspiracy to restrain trade in violation of section 1 of the Sherman Act (15 USC 1) by respondent and some or all of the members comprising the respondent association.

The trial court considered the evidence and found no conspiracy, determined that the commercial standards activities of respondent before the United States Department of Commerce were reasonable and proper, specifically found that respondent and its members had no improper motive or evil intent toward petitioner, that the Association's failure to secure a change in CS 45-55, or its procuring of the adoption of CS 45-60, was not shown to have been the proximate cause of any damage to petitioner, and, further, that at all events any failure of respondent to test petitioner's products had not "caused any damage since petitioner did secure the services of another testing agency." (Opinion of Trial Court, Appendix A, pp. 25, 29, Petition for Certiorari in case at bar, hereinafter referred to as "Petition")

Below, in the Court of Appeals, each of petitioner's four assignments of error were challenges to the Findings of Fact. (See Petitioner's Opening Brief in Court of Appeals, p. 8, reproduced in Appendix A to this Brief of Respondent in Opposition.)

With respect to such challenge, the Court of Appeals concurred in the findings of the trial judge, stating (Opinion of Court of Appeals, Appendix B., p. 32 Petition):

> "The trial court specifically found (1) conspiracy was not shown by the evidence and, (2) appellee's conduct, and any restraint of trade resulting therefrom were reasonable under all of the circumstances existing at the time of the events in question. Our review of the entire record discloses ample evidence supporting both findings of the trial court and no fact finding by the trial court is held clearly erroneous. Rule 52(a), Fed. R. of Civ. Pro.; *Cataphone Corp. v. DeSoto Chemical Coatings, Inc.,* 356 F.2d 24, 26 (9th Cir., 1966); *Sherrill v. McShan,* 356 F.2d 607 (9th Cir., 1966)."

This brings into play the well settled rule of this court that where the facts "have been found in favor of the respondent by both courts below, we do not review them." *Page v. Arkansas Gas Corp.,* 286 U.S. 269, 271.

This court has consistently followed the practice of declining to review facts found by both lower courts of the federal system. And the court has frequently stated that the "concurrent findings of the two lower courts will be accepted without re-examination of the evidence." *Allen v. Trust Co. of Georgia,* 326 U.S. 630, 636; *Just v. Chambers,* 312 U.S. 383, 385; *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 214; *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.,* 340 U.S. 147, 153; *Berenyi v. Immigration Director,* 385 U.S. 630, 635.

Petitioner nevertheless invites this court to re-examine the evidence of the long eight-day trial and to reach conclusions from the voluminous record contrary to those reached by the two courts below. This cannot be done in these circumstances, certainly not "in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Director, supra,* p. 635. No such "very obvious and exceptional" error has here been shown, or attempted to be shown, by petitioner.

We respectfully submit that the foregoing principles of judicial review in this court dispose of this petition and, without more, justify its denial.

(2) PETITIONER'S ALLEGED QUESTION IS NOT HERE.

Petitioner says broadly "the question for consideration by the court is what are the duties of a trade association when it undertakes to formulate and promote a commercial standard" (Petition, p. 11, also p. 2).

That question is not here, but only the question of violation of section 1 of the Sherman Act, a question which, as noted above in part 1 of this brief, has been adversely determined on the facts by both courts below.

This court has long sanctioned the normal activities of trade associations, absent any preponderantly established proof of violation of the anti-trust laws: *Chicago Board of Trade v. U.S.,* 246 U.S. 231; *Maple Flooring Manufacturers' Association v. U.S.,* 268 U.S. 563.

A case factually similar to the one at bar involving failure to meet manufacturing standards is *Roofire Alarm Co. v. Royal Indemnity Company,* 202 F.Supp. 166 (1962), affirmed 313 F.2d 625 (C.A. 6, 1963) certiorari denied 373 U.S. 949 (1963). The bearing of the Sherman Act on the facts of that case was considered and no viclation was found.

The Plywood Association has always, along with many other industries subject to Commercial Standards promulgated by the United States Department of Commerce, had a legitimate interest in commercial standards for the products of its members. This interest or purpose is the protection of the consumer and its own reputation against sub-standard products. As pointed out by the trial court (Petition, p. 25) "any system of standards presupposes that there are standard and non-standard items." If it were a violation of the anti-trust law to exclude non-standard items, there could be no standards whatever, contrary to the intent of Congress. Since standardization is a lawful practice expressly authorized by Congress for consumer protection (15 USC §272; Reorganization Plan No. 3, section 601, effective July 16, 1946, 11 F.R. 7877, 60 Stat. 1110) and encouraged by the Department of Commerce (Code of Federal Regulations, Title 15, Subtitle A, Part 10, 47), any such standards promulgated by the Department of Commerce are presumptively valid unless shown to be unreasonable. Industry has no way of making its views unilaterally effective because "the Department of Commerce will not publish a standard or revise a published standard until satisfied that it is approved by the industry and other interested groups" (Opinion, trial court, Petition, p. 18). "The Department of Commerce will not publish one which is not accepted

as satisfactory by the producers and users" (Opinion, trial court, Petition, p. 22). Before approving a standard, the Department circularizes the trade, including consumer groups and interested government agencies. Hence a promulgated standard after such a wide search for concensus bears the mark of reasonableness as found by the proper government agency. Inaction on the part of respondent in not working for a change which petitioner desired, but which respondent did not consider wise, is not an unreasonable restraint of trade, because of the protective procedure of the Department of Commerce.

The trial court observed the many witnesses before it and refused to draw any inferences that respondent had a bad motive or an unlawful intent toward petitioner.

The judges of the Court of Appeals are "not authorized to substitute our judgment for that of the district court with reference to the inference properly to be drawn from such testimony." *Filger v. Plax Corp.,* 6 Cir., 261 F.2d 369, 371 (1958). "If the evidence is susceptible of different inferences, the inference-drawing is for the trial court not this court." *Weaver v. U.S.,* 10 Cir., 334 F.2d 319, 320-1 (1964).

The rule is applied with special and "peculiar" vigor in anti-trust cases in regard to findings of "design, motive and intent." *United States v. Edwards,* 5 Cir., 333 F.2d 575, 578 (1964).

Remarking that such determinations are for the trial court, and "not to be tried by us *de novo,*" the Fifth Circuit in the case just cited quotes from the anti-trust decision in *U.S. v. Yellow Cab Co.,* 338 U.S.

338, 341 (1949):

> "Findings as to design, motive and intent with which men act depend *peculiarly* upon the credit given to witnesses by those who see and hear them." (Italics supplied)

Here the trial court saw and heard them and found no unlawful intent.

As pointed out above, the broad question which petitioner poses above is not here; and the single question of conspiracy has been disposed of by both courts below.

CONCLUSION

Bluntly stated, the petitioner is seeking a review by the Supreme Court of the United States of the evidence before the trial court and the findings of the trial court. These factual issues have been resolved by both courts below and will not be reviewed here.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 21,941

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
STRUCTURAL LAMINATES, INC.

vs.

DOUGLAS FIR PLYWOOD ASSOCIATION

(excerpt from p. 8 of Appellant's Opening Brief)

SPECIFICATION OF ERRORS

1. The District Court erred in finding that Appellee's refusal to include 3 ply ½ inch plywood sheathing as a Commercial Standard product was not a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The District Court erred in finding that Appellee had not misrepresented 3 ply ½ inch sheathing to plywood buyers, users and others.

3. The District Court erred in finding that Appellee's conduct was not the proximate cause of damage to Appellant.

4. The District Court erred in finding that 3 ply ½ inch sheathing was not a permissible construction under Commercial Standard CS 45-55.